HIJAU BIRU ENVIROTECH SDN BHD v. TETUAN DZAHARA & ASSOCIATES & ORS

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
HAS ZANAH MEHAT JCA
S NANTHA BALAN JCA
[CIVIL APPEAL NO: W-04(NCvC)(W)-421-08-2019]
2 JULY 2020

TORT: *Negligence – Professional negligence – Negligence of solicitors – Right of client to terminate services of solicitors – Whether solicitors vigilant in handling of litigation files – Whether inactions or inadequacies by solicitors decimated client's chance of recovery – Whether trial judge misdirected himself in admitting order of Advocates and Solicitors Disciplinary Board – Whether solicitors liable for negligence*

LEGAL PROFESSION: *Duty of care – Negligence – Professional negligence of solicitors – Right of client to terminate services of solicitors – Whether solicitors vigilant in handling of litigation files – Whether inactions or inadequacies by solicitors decimated client's chance of recovery – Whether trial judge misdirected himself in admitting order of Advocates and Solicitors Disciplinary Board – Whether solicitors liable for negligence*

This appeal arose out of a claim by the appellant against their former solicitors, the respondents, for their negligence in respect of the appellant's claim in court which was struck out due to the absence of the appellant's solicitor, the third respondent, when the suit was called up for continued hearing. The appellant had engaged the law firm, the first respondent, to commence legal action against Sinnayah & Sons Sdn Bhd ('Sinnayah') to claim for the balance amount outstanding for subcontract works carried out by the appellant valued at RM482,442.92. The third respondent personally handled the case on behalf of the appellant. The suit against Sinnayah ('Suit 04') was filed in the Sessions Court and was fixed for full trial. However, the third respondent's mother passed away on 6 January 2016 and the case was coming up for continued hearing the next day on 7 January 2016. Therefore, a request was made for an adjournment of the continued hearing of the trial. The request for adjournment was made *via* telephone calls to the solicitors representing Sinnayah and to the court. The request for adjournment was not confirmed in writing. The continued hearing of the trial on 7 January 2016 was vacated and the case was then called up on 11 January 2016 for continued hearing. The third respondent was absent and calls were made to the first respondent's office by the solicitors for Sinnayah but to no avail. As such, Suit 04 was struck out. On 14 January 2016, the first respondent came to know that Suit 04 was struck out and filed an application to reinstate Suit 04, which was dismissed. The first respondent did not appeal to the High

Court against the dismissal of the said application. Subsequently, on 17 May 2016, the respondent filed a second suit against Sinnayah at the Sessions Court ('Suit 18'). The Sessions Court struck out Suit 18 and opined that it was an abuse of process for Suit 18 to have been filed without there being an appeal against the Sessions Court's refusal to reinstate Suit 04. On 11 October 2016, the first respondent lodged an appeal to the High Court against the decision of the Sessions Court. Thereafter, and before the appeal to the High Court came up for hearing, the appellant terminated the services of the first respondent as their solicitors on 9 January 2017. The appellant filed Suit 313 which was predicated on a cause of action of negligence against the respondents. Apart from the failure to attend court on 11 January 2016, the appellant's other complaint of negligence against the respondents was their failure to appeal to the High Court against the dismissal of the application to reinstate Suit 04. On 26 March 2018, the Sessions Court ('SCJ') allowed the appellant's claim in Suit 313 and entered judgment against the first and second respondents. The respondents appealed to the High Court against the said decision. The High Court, in reversing the decision of the Sessions Court, opined that the appellant had 'wrongfully terminated' the services of the respondents and that by their own non-attendance in court in respect of Suit 04 on 11 January, the appellant were themselves negligent. The High Court also concluded that since a complaint of misconduct against the respondents under s. 100(1)(a) of the Legal Profession Act 1976 had been dismissed by the Advocates and Solicitors Disciplinary Board ('ASDB') per ASDB order dated 10 August 2018, it followed that there would be no professional indemnity insurance cover for the respondents and that in those circumstances, it would be wrong to hold the respondents liable for negligence. Hence, this appeal by the appellant. The critical issue before this court was whether the High Court Judge ('HCJ') had in turn erred or misdirected himself in interfering with the decision of the SCJ who had found that the respondents were liable for negligence.

Held (allowing appeal)

Per S Nantha Balan JCA delivering the judgment of the court:

(1) The appellant, clearly and understandably, were most unhappy with the state of things and were entitled to terminate the services of the first respondent as their solicitors. That was always the appellant's right as the client of the first respondent law firm. The so called 'wrongful termination' of the first respondent was not the causative event which deprived the appellant of the loss of chance to sue Sinnayah. The termination of the first respondent as the appellant's solicitor and the non-prosecution of the appeal (*vis-a-vis* striking out of Suit 18) did not in any way alter or mitigate the situation or problem which was already caused by the first respondent's handling (or rather mishandling) of Suit 04 which lay at the epicentre of the appellant's complaint of negligence against the respondents. (paras 60-62)

(2) The respondents were negligent in a number of respects in terms of their handling of Suit 04. First, there was no dispute that the next set of trial dates were all fixed. The third respondent was present in court on that day. Thus, these dates ought to have been entered in the respective diaries of the respondents. Next, the manner in which the adjournment of the part-heard trial was sought was inherently risky. It was absolutely imperative and necessary as part of proper risk management, that the telephone call(s) be subsequently confirmed in writing so as to obviate any misunderstanding or miscommunication. The Sessions Court had only vacated the hearing fixed for 7 January 2016. The other dates were maintained. The respondents did not see it fit or necessary to confirm in writing their so-called understanding that all the trial dates were to be vacated. Thus, the request for adjournment of the trial dates was mishandled. (paras 65-67 & 73)

(3) The respondents had compounded or aggravated their initial negligence by taking the route of not filing an appeal against the dismissal of the reinstatement application and proceeding instead to file Suit 18. Of course, there was no certainty that an appeal to the High Court or the Court of Appeal would have resulted in a reinstatement of Suit 04, as the situation was not helped by the lack of forthrightness on the part of the respondents as to the precise reason for their non-attendance on 11 January 2016 and the third respondent's woefully inadequate and unclear affidavit-in-support of the application to reinstate Suit 04. Yet further, the third respondent did not reply to the affidavit by Sinnayah's solicitor which stated that the request was only for 7 January 2016 to be vacated. This last omission spoke volumes against the respondents. (para 84)

(4) By their various actions and inactions or inadequacies, the respondents had decimated the appellant's chance of recovery against Sinnayah. In the event, there was a clear and unmistakable finding of professional negligence by the SCJ in Suit 313 and those findings were clear, cogent and convincing. A reasonably competent advocate and solicitor who represents a client in court proceedings must not only be up-to-date with the law (both procedural and substantive) but must also perform the most basic, fundamental and rudimentary duty of attending court on the hearing or mention or case management date. Thus, the most dreadful and professionally threatening situation for any advocate and solicitor is where the action is struck off or judgment in default is entered due to counsel's absence in court. With that, the damage to the client would have crystallised. There was no appealable error or any misdirection by the SCJ in her conclusions as to the respondents' liability for negligence. (paras 1, 2, 85 & 87)

(5) The HCJ had misdirected himself in admitting the ASDB Order and in relying upon the same in exonerating the respondents of negligence. The ASDB Order was totally irrelevant as the SCJ and/or the HCJ were not bound by the findings of the ASDB. Further, it was not open to the HCJ to opine that the appellant was negligent. He should have confined himself to the pleaded case. Consequently, the HCJ was plainly wrong in his approach and assessment of the issues on appeal before him. (paras 91 & 92)

Case(s) referred to:

Genesis World Sdn Bhd v. Mobikom Sdn Bhd [2003] 7 CLJ 100 HC ***(refd)***
Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***
Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh Mamat & Ors [2009] 5 CLJ 1 CA ***(refd)***
Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors And Another Application [2010] 3 CLJ 895 FC ***(refd)***
Lim Oh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 FC ***(refd)***
Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344 CA ***(refd)***
Ngan Siong Hing v. RHB Bank Bhd [2014] 3 CLJ 984 CA ***(foll)***
Nyo Nyo Aye v. Kevin Sathiaseelan Ramakrishnan & Anor And Another Appeal [2020] 5 CLJ 82 CA ***(foll)***
Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd [2016] 10 CLJ 112 CA ***(refd)***
Punj Lloyd Oil & Gas (Malaysia) v. Etiqa Insurance Bhd & Ors [2014] 1 LNS 1152 HC ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Shearn Delamore & Co v. Sadacharamani Govindasamy [2017] 2 CLJ 665 CA ***(refd)***
Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal [2009] 3 CLJ 751 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 68(1)
Legal Profession Act 1976, s. 100(1)(a)
Rules of Court 2012, O. 18 r. 19, O. 55 r. 7

For the appellant - Devinder Singh & Balvinder Singh; M/s Shahrul Balvinder & Co
For the respondents - Dzahara Mit Dahlan; M/s Dzahara & Assocs

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Appeal No: WA-12BNCVC-36-04-2018 (overruled)]

Reported by Suhainah Wahiduddin

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] The background facts to this appeal exemplify the nightmare scenario for every advocate and solicitor engaged in litigation work and underscores the imperative need for constant risk management and vigilance in the handling of litigation files. It is therefore obvious enough that a reasonably

competent advocate and solicitor who represents a client in court proceedings must not only be up-to-date with the law (both procedural and substantive), but must also perform the most basic, fundamental or rudimentary duty of attending court on the hearing or mention or case management date, as the case may be. (see *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors* [2009] 5 CLJ 1; [2009] 4 MLJ 610; [2010] AMR 285 CA and the instructive decision of the Federal Court in respect of the same case reported as [2010] 3 CLJ 895; [2010] MLJU 34 FC).

[2] Thus, the most dreadful and professionally threatening situation for any advocate and solicitor is where the action is struck off or judgment in default is entered due to counsel's absence in court. With that the damage to the client would have crystallised. What happens thereafter in terms of whether the predicament is remedied or ameliorated remains largely in the hands of the court as to whether the court's discretion should be exercised to reinstate the action, or to set aside the default judgment.

[3] The present appeal arises out of a claim by the appellant against the respondents (their former solicitors) for their negligence in respect of the appellant's claim in court which was struck out (with costs) due to the absence of the appellant's solicitor (third respondent) when the suit was called up for continued hearing.

[4] The first respondent is a law firm. The appellant was a former client of the first respondent. The second respondent is a partner of the first respondent. The third respondent was also a partner of the first respondent. The appellant had engaged the first respondent to commence legal action against Sinnayah & Sons Sdn Bhd ("Sinnayah") to claim for the balance amount outstanding for sub-contract works carried out by the appellant valued at RM482,442.92. The third respondent personally handled the case on behalf of the appellant. The suit against Sinnayah was filed in the Sessions Court in Melaka and was fixed for full trial.

[5] The appellant's witness testified and their case was closed. Sinnayah's witnesses testified and the case was thereafter fixed for continued hearing. The third respondent did not turn up in court and the suit was struck out. The first respondent applied to have the suit reinstated, but was unsuccessful. The respondents did not appeal to the High Court. Instead, they filed a second suit against Sinnayah. The second suit was struck out as being an abuse of process. The first respondent filed an appeal to the High Court against the striking out of the second suit. The appellant terminated the services of the first respondent and did not pursue the appeal to the High Court.

[6] The appellant filed an action in the Sessions Court for negligence against the respondents. The appellant's claim was allowed. The respondents appealed to the High Court. The High Court allowed the appeal and set aside the judgment of the Sessions Court. The appeal herein is directed at the said decision of the High Court.

First Suit Against Sinnayah

[7] On 17 September 2014, the first respondent (as the appellant's solicitors), filed a writ of summons and statement of claim against Sinnayah *via* Melaka Sessions Court Suit No: B52C-04-09-2014 ("Suit 04"). The trial of Suit 04 was heard over several days in 2015. Suit 04 was scheduled for continued hearing on **7 January 2016, 11 January 2016**, 1 and 2 February 2016. These dates were fixed by the Sessions Court on 29 September 2015. (see: Q/A7 of third respondent's witness statement). (emphasis added)

[8] The third respondent's mother passed away on 6 January 2016. The case was coming up for continued hearing the next day on 7 January 2016. Therefore, a request was made for an adjournment of the continued hearing of the trial. The request for adjournment was made *via* telephone calls to the solicitors representing Sinnayah, and to the court. The request for adjournment was not confirmed in writing. There is no dispute that the continued hearing of the trial on 7 January 2016 was vacated.

[9] The case was then called up on 11 January 2016 for continued hearing. The third respondent was absent. The solicitor for Sinnayah made seven calls to the first respondent's office but to no avail. As such, Suit 04 was struck out on 11 January 2016 at around 12.30pm. The Sessions Court later assessed costs at RM19,324.

[10] On 14 January 2016, the first respondent came to know that Suit 04 was struck out. They filed an application on 22 January 2016 to reinstate Suit 04. The application was supported by the affidavit of the third respondent. On 26 February 2016, the application to reinstate Suit 04 was dismissed with costs of RM2,000. **The first respondent did not appeal to the High Court against the dismissal of the application to reinstate Suit 04.** (emphasis added)

Second Suit Against Sinnayah

[11] On 17 May 2016, the first respondent filed a **second suit** against Sinnayah *via* Melaka Sessions Court Suit No. B52NCVC-18-05-2016 ("Suit 18"). On 15 June 2016, Sinnayah applied to strike out Suit 18 under O. 18 r. 19 of the Rules of Court 2012, on the ground that it was **an abuse of process**. (emphasis added)

[12] On 29 September 2016, Suit 18 was struck out with costs of RM4,000. In striking out Suit 18, the Sessions Court had opined that it was an abuse of process for Suit 18 to have been filed without there being an appeal against the Sessions Court's refusal to reinstate Suit 04.

Appeal Against Striking Out Of Suit 18

[13] On 11 October 2016, the first respondent lodged an appeal to the High Court against the decision of the Sessions Court dated 29 September 2016. Thereafter, and before the appeal to the High Court came up for hearing, the appellant terminated the services of the first respondent as their solicitors on 9 January 2017. The appellant did not pursue the appeal to the High Court. According to the appellant, based on the jurisprudence as per the decision of the Federal Court in *Lim Oh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233; [2001] 3 MLJ 481; [2001] 2 AMR 2981 FC, and other cases, the appeal to the High Court against the striking out of Suit 18 was doomed to fail.

Negligence Suit – Suit 313

[14] On 18 July 2017, the appellant filed Kuala Lumpur Sessions Court Suit No. WA-B53NCVC-313-07-2017 ("Suit 313") which was predicated on a cause of action of negligence against the respondents. The allegations of negligence against the respondents are as follows:

> xiv. Berdasarkan diatas, Plaintif menyatakan bahawa Peguam Plaintif iaitu Defendan-Defendan tersebut telah cuai di dalam di dalam (*sic*) tanggungjawab fidusiarinya terhadap Plaintif dan juga telah gagal dan/atau cuai untuk menjaga kepentingan Plaintif sehinggakan, akibat konduk Defendan-Defendan sendiri, Guaman tersebut telah dibatalkan dengan kos.
>
> xv. Plaintif juga menyatakan bahawa kecuaian Defendan-Defendan tersebut juga boleh dilihat dimana Defendan-Defendan tersebut telah memfailkan satu permohonan untuk menghidupkan kembali Guaman tersebut yang telah dibatalkan pada 11.01.2016 (kandungan 26) dan pada **26.02.2016** Makamah yang mulia tersebut setelah membaca Kandungan 26, affidavit-afidavit (*sic*) pihak-pihak, hujahan-hujahan bertulis pihak-pihak dan hujahan-hujahan lisan peguam-peguam, maka, Mahkamah yang mulia tersebut telah menolak Kandungan 26 tersebut dengan kos sebanyak RM2,000.00 (Defendan-Defendan telah cuai untuk memasukkan tarikh **11.01.2016** di dalam diari kehadiran Mahkamah Defendan-Defendan) ["Defendants' court attendance diary"] sesungguhpun Defendan-Defendan di dalam tindakan ini mempunyai pengetahuan yang sepenuhnya tentang tarikh **11.01.2016** tersebut.
>
> xvi. Plaintif juga menyatakan bahawa Defendan-Defendan tersebut telah cuai untuk memaklumkan segala fakta-fakta di atas kepada Plaintif (B [xii-xv] seperti diatas) dan Plaintif hanya mengetahui tentang kecuaian Defendan-Defendan tersebut setelah Plaintif

memohon Nota-Nota keterangan daripada Mahkamah Yang Mulia tersebut melalui surat bertarikh 26.10.2016 yang telah diterima oleh Mahkamah pada 01.11.2016 (secara serahan tangan) dan setelah menerima dan membaca nota-nota tersebut dan mendapati Guaman tersebut telah dibatalkan dengan kos untuk ditaksirkan oleh Pendaftar dan Kandungan 26 telah ditolak dengan kos sebanyak **RM2,000.00**.

xvii. Plaintif menyatakan bahawa kecuaian dan/atau kegagalan Defendan-Defendan tersebut untuk memaklumkan fakta-fakta yang sebenarnya seperti diatas kepada Plaintif dengan jelas mencerminkan bahawa Defendan-Defendan tersebut telah gagal untuk mematuhi amalan guaman kaedah-kaedah yang beretika ("failure to comply etiquettes rules of the legal profession").

xviii. Plaintif seterusnya menyatakan bahawa kecuaian Defendan-Defendan tersebut di dalam tindakan ini dapat diperlihatkan apabila Defendan-Defendan tersebut telah gagal untuk memfailkan satu rayuan terhadap keputusan Mahkamah yang mulia tersebut yang diberikan pada **26.02.2016** dan sebaliknya, telah secara cuai dan salah tanpa mengikut prosedur yang betul Kaedah-Kaedah Mahkamah 2012, memfailkan satu Guaman baru dengan memfailkan Writ Saman dan Pernyataan Tuntutan yang bertarikh 17.5.2016 masing-masing di Mahkamah Sesyen Melaka melalui Guaman Kedua No. B52NCVC-18-05/2016 ("Guaman Kedua tersebut") yang melibatkan pihak-pihak dan tuntutan yang sama seperti di dalam Guaman tersebut.

C. GUAMAN KEDUA NO. B52NCVC-18-05/2016 ("GUAMAN KEDUA TERSEBUT") DAN BUTIR-BUTIR KECUAIAN DEFENDAN-DEFENDAN.

xix. Plaintif menyatakan, akibat fakta di dalam perenggan xviii diatas, peguam syarikat tersebut telah memfailkan satu permohonan bertarikh **15.6.2016** untuk membatalkan Guaman Kedua (kandungan 5) dan Mahkamah yang mulia tersebut telah pada **29.9.2016** setelah membaca kandungan 5 dan afidavit-afidavit Defendan-Defendan tersebut dan afidavit-afidavit (*sic*) pihak syarikat tersebut, hujahan-hujahan bertulis pihak-pihak dan juga setelah mendengar hujahan-hujahan lisan peguam-peguam, maka, Mahkamah tersebut telah membenarkan permohonan kandungan 5 dengan kos sebanyak RM4,000.00 dengan alasan bahawa Guaman Kedua tersebut merupakan satu penyalahgunaan proses Mahkamah ("abuse of the court process") dan fakta ini sememangnya di dalam pengetahuan Defendan-Defendan tersebut dengan sepenuhnya.

xx. Plaintif menyatakan bahawa Defendan-Defendan tersebut telah cuai untuk menjaga kepentingan Plaintif dengan gagal untuk memfailkan satu Notis Rayuan terhadap keputusan Mahkamah yang bertarikh 26.02.2016 tetapi sebaliknya telah memfailkan

Guaman Kedua tersebut yang juga telah dibatalkan oleh Mahkamah yang mulia tersebut sebagai satu penyalahgunaan proses Mahkamah.

xxi. Plaintif menyatakan bahawa Defendan-Defendan tersebut juga telah cuai apabila gagal untuk memberi sebarang maklum balas tentang fakta di perenggan (xviii, xix dan xx) seperti diatas kepada Plaintif dan Plaintif hanya mendapat tahu mengenai fakta ini apabila Pengarah Urusan Plaintif, Hussain Bahar Binti Ahmad Khan telah menerima segala kertas-kertas kausa bagi Guaman tersebut dan Guaman Kedua tersebut, Rekod Rayuan (Jilid 1 & 2) melalui surat Defendan Pertama bertarikh **16.01.2017**.

xxii. Plaintif menyatakan bahawa berdasarkan diatas, Defendan-Defendan tersebut telah melalui kelakuan/konduk buruknya ("misconduct") dengan cuai dan/atau dengan sengaja dan/atau secara kasar ("grossly") mengabaikan ("disregarded") kepentingan Plaintif dan oleh itu Defendan-Defendan tersebut adalah tanggungjawab ("liable") tehadap (*sic*) konduknya yang tidak berpadan ("unbefitting") sebagai Peguambela dan Peguamcara Plaintif.

xxiii. Plaintif juga menyatakan bahawa konduk Defendan-Defendan tersebut yang tidak berpadan ("unbefitting") sebagai Peguambela dan Peguamcara Plaintif juga dapat dilihat apabila Defendan-Defendan tersebut telah secara cuainya memfailkan satu Notis Rayuan bertarikh 11.10.2016 di Mahkamah Tinggi Melaka terhadap keputusan Mahkamah Sesyen Melaka yang diberikan pada 29.9.2016 (kandungan 5) dan bukannya terhadap keputusan Mahkamah Sesyen Melaka yang diberikan pada 26.02.2016 (kandungan 26) yang adalah merupakan mode dan prosedur yang betul mengikut Kaedah-Kaedah Mahkamah 2012.

xxiv. Plaintif menyatakan bahawa akibat kecuaian Defendan-Defendan tersebut seperti diatas, Plaintif telah kehilangan tuntutan yang sah ("lost its legitimate claim") terhadap syarikat tersebut.

(emphasis added)

[15] Apart from the failure to attend court on 11 January 2016, the appellant's other complaint of negligence against the respondents is their failure to appeal to the High Court against the dismissal of the application to reinstate Suit 04.

[16] Indeed, if there had been an appeal to the High Court and if the outcome was unfavourable, then the decision of the High Court could have been taken further on appeal to the Court of Appeal.

[17] However, the first respondent decided not to take that route. They chose another route – they filed Suit 18 against Sinnayah. The appellant's complaint is that the appellant was not given the full picture of what was going on and was not advised on their options and all these steps were taken unilaterally by the first respondent.

[18] In Suit 313, the appellant sought the following reliefs:

(i) special damages of RM482,442.92;

(ii) RM25,340 being the costs awarded by the court in the proceedings at the Melaka Sessions Court proceedings against the plaintiff;

(iii) legal fees of RM11,000;

(iv) interest at the rate of 2.5% p.a. for the amount stated in para (a), (b) and (c) from the date of negligence till date of judgment;

(v) general damages for loss of opportunity in obtaining other projects;

(vi) interest at the rate of 5% p.a. for general damages from the date of filing of the writ till date of judgment;

(vii) interest at the rate of 5% p.a. for general damages on the judgment sum; and

(viii) costs.

[19] By then the third respondent had been declared a bankrupt and Suit 313 was withdrawn *vis-a-vis* the third respondent. Strictly, the third respondent should not be named as a party to the present appeal. The reference to the respondents hereafter is to be construed as a reference to the first and second respondents only. Where necessary, the third respondent may be referred to individually.

Sessions Court Order – Suit 313

[20] On 26 March 2018, the learned judge of the Sessions Court ("the SCJ") allowed the appellant's claim in Suit 313 and entered judgment against the first and second respondents.

[21] The SCJ's order reads as follows:

> MAKA ADALAH PADA HARI INI DIHAKIMI bahawa tuntutan Plaintif terhadap Defendan Pertama dan Defendan Kedua secara bersesama dan/atau berasingan untuk Gantirugi Khas bagi jumlah wang sebanyak RM482,442.92 (Ringgit Malaysia Empat Ratus Lapan Puluh Dua Ribu Empat Ratus Empat Puluh Dua dan Sen Sembilan Puluh Dua), jumlah wang sebanyak RM25,340.00 sebagai kos-kos yang telah diawadkan oleh Mahkamah di dalam Guaman tersebut dan Guaman Kedua tersebut, bayaran fee guaman sebanyak RM11,000.00, faedah pada kadar 2.5% setahun ke atas jumlah RM518,782.92 dari tarikh kecuaian sehingga ke tarikh penghakiman dan faedah 5% setahun ke atas jumlah RM518,782.92 dari tarikh 26.3.2018 sehingga tarikh penyelesaian sepenuhnya dibenarkan dengan kos sebanyak RM25,000.00 dan Gantirugi Am bagi kemungkiran Kontrak dan/atau kecuaian serta kehilangan peluang untuk mendapatkan projek-projek lain dan segala faedah adalah tidak dibenarkan.

Appeal To The High Court

[22] The respondents appealed to the High Court. On 4 July 2019, the learned judge of the High Court ("learned judge") allowed the respondents' appeal against the decision of the SCJ. The appellant now appeals to this court against the decision of the High Court.

Letter Of Demand

[23] Prior to Suit 313 being filed, the appellant through its new solicitors, Messrs Shahrul Balvinder & Co issued a letter dated 27 April 2017 and made a demand against the respondents in respect of their negligence. Pursuant to the letter of demand, the appellants sought the sum of RM482,442.92 from the respondents being the sum which the appellant should have received from Sinnayah but due to the negligence of the respondent, the said sum remains unrecoverable. There was **no response** to the letter of demand. (emphasis added)

[24] The letter of demand reads as:

> Tetuan Dzahara & Associates
> Advocates & Solicitors
> LR-4D1, Menara D, Tingkat 5,
> Persiaran MPAJ, Jalan Pandan Utama,
> Pandan Capital, Pandan Indah,
> 55100 Ampang, Selangor
> A.R REGISTERED/CERTIFICATE OF POSTING
>
> And/or
>
> Dzahara Mit Dahlan (NRIC: 730630-12-5508)
> Advocates & Solicitors
> (practising under the name and style Tetuan Dzahara & Associates)
> LR-4D1, Menara D, Tingkat 5,
> Persiaran MPAJ, Jalan Pandan Utama,
> Pandan Capital, Pandan Indah,
> 55100 Ampang, Selangor
>
> Dear Sirs/Madame,
>
> Re: Professional misconduct by you and/or your firm which tantamount to Negligence
>
> 1. We refer to the above matter wherein we have instructions to act for Hijau Biru Envirotech Sdn Bhd ("our Client").
> 2. We are informed by our Client that you, Madame Dzahara Mit Dahlan and Mr. Azwan Bin Abdul Wahab are both partners in Tetuan Dzahara & Associates ("the firm").

3. We are informed by our Client that they have engaged yours and/ or your firm's services in a Breach of Contract suit against the Sinnayah & Sons Sdn. Bhd. being the Defendant, as evident in your demand letter dated 04.7.2014 ("the letter") full particulars of which are well within your knowledge.

4. We are also informed by our Client that you and/or your firm had initiated a Breach of Contract suit against the Defendant by filing a Writ Summons and the Statement of Claim both dated 17.9.2014 *vide* Mahkamah Sesyen Melaka-Guaman No: B52C-04-09/2014 ("the suit") which was followed by the Defendant's defence dated 27.10.2014 and amended Defence dated 18.8.2015 against the suit and your and/or your firm's reply to the amended defence dated 28.8.2015 (full particulars of which are well within your knowledge).

5. We are further informed by our Client that the suit was fixed for full trial on 11.9.2015 wherein the Plaintiff had only one witness that was Madame Hussian Bahar Binti Ahmad Khan and the court proceeded to hear the testimony given by her in her personal capacity as the Managing Director of the Plaintiff and after, all the courts proceedings, the witness, Madame Hussian Bahar Binti Ahmad Khan was released on 29.9.2015.

6. We are further informed by our Client that on 29.9.2015, the Defendant had five (5) witnesses and they had proceeded with examination-in-chief with the SD-1, Suhaila Binti Ramli and the cross-examination on the SD-1 was done on 30.9.2015 and was further cross-examined on 27.10.2015 and 13.11.2015 respectively. Further, SD-1 was re-examined on 27.11.2015 and was released on the said date.

7. We are also informed by our Client that on 30.9.2015, the Honourable court had fixed numerous dates for continued hearing of the suit and the dates are, *inter alia*:- 27.10.2015, 13.11.2015, 27.11.2015, 30.11.2015, 07.12.2015, 08.12.2015, 09.12.2015, 10.12.2015, 14.12.2015, 15.12.2015 (the date 02.10.2015 which was originally fixed, was vacated upon the request made by the Plaintiff's solicitors).

8. We are informed by our Client that on 27.11.2015, the Defendant's solicitors continued with the examination-in-chief with their witness SD-2, Ashok Kumar a/l Balakrishnan, followed by the cross-examination by the Plaintiff's solicitors, the cross-examination was carried forward to 30.11.2015 and the cross-examination was continued again on 07.12.2015.

9. Further, we are informed by our Client that on 07.12.2015, the Honourable Court had fixed additional dates for continued hearing which are as follows:- 07.01.2016 and 11.01.20166, 01.02.2016 and 02.02.2016 and both the solicitors were fully aware of these dates.

10. We are informed by our Client that on 07.12.2015, the cross-examination was concluded with the SD-2 and the Defence Solicitors had requested to the Honourable Court to allow him to prepare the questions and answers (Q & A) for re-examination including the agreed documents on the next hearing date and meanwhile, the Plaintiff's solicitors had requested that he should been given the right to question the contents of the said documents to which the Honourable Court had acceded to the requests and the continued hearing was fixed on 07.01.2016.

11. We are also informed by our Client that, for some reasons the continued hearing did not go on, on the 07.01.2016, henceforth, the court had fixed it on 11.01.2016.

12. We are however informed by our Client that *on the 11.01.2016, you and/or your firm had failed to attend court even after the Defendant's solicitors had called seven (7) times to your office.* Hence, upon the request of the Defendant's solicitors at 12.02pm, the honourable court had *struck out* the Plaintiff's suit with cost (dibatalkan dengan kos) to be assessed by the Registrar and all other hearing dates were vacated.

13. We are informed by our Client that you and/or your firm had filed an application to re-instate the suit against the decision given by the Honourable Court on *11.01.2016,* ("the application") [enclosure 26] and the same was fixed for hearing on 26.02.2016 wherein on *26.02.2016* the Honourable Court heard the submissions by the lawyers wherein the Defendant's lawyer had objected to the application stating the grounds that the Plaintiff's failure to attend the court on 11.01.2016 was due to the fact that the Plaintiff's solicitors was negligent in failing to enter the hearing dates in his court attendance diary. Accordingly, the Honourable court had *dismissed* the application to re-instate the suit with cost of RM2000.00. (ditolak dengan kos sebanyak RM2,000.00).

14. We are also informed by our Clients that all facts as mentioned above were not divulged by you and/or your firm to our Clients. Instead, our Clients have discovered these facts from the notes of evidence which was applied by our Client at the Malacca High Court registry. We are further informed by our Clients that such an act and/or conduct for not divulging the true facts to our Clients tantamount to concealing material facts from our Clients which went against the etiquettes rules of the legal profession.

15. We are also informed by our Client that as a result of the dismissal of the reinstatement application as abovementioned, that instead of you and/or your firm filing an *appeal* against the decision given by the Honourable Court on 26.02.2016, you and/or your firm had negligently filed a second suit against the Defendant by filing a Writ

Summons and the Statement of Claim both dated *17.5.2016 vide* Mahkamah Sesyen Melaka – Guaman No: B52NCVC-18-05/2016 ("the second suit") which was blatantly wrong in procedure and *vide* striking out application made by the Defendant's solicitors dated 15.6.2016 (enclosure 5), the Honourable Court had on 29.9.2016 allowed the enclosure 5 with cost of RM4000.00 as the second suit amounted to the abuse of the court process (full particulars of which are well within your knowledge).

16. We are informed by our Client was also not aware of the facts as stated in para 15 above as our Client only learnt about this facts when our Client's Managing Director, Madame Hussian Bahar Binti Ahmad Khan was handed over with all the relevant cause papers and Rekod Rayuan (Jilid 1 & 2) *vide* your firm's letter dated 16.1.2017, full particulars of which are well within your knowledge.

17. In reference to the above, we are further informed by our Client that you and/or your firm's Professional misconduct had grossly disregarded of our Client's interest and thus, you and/or your firm's being liable of such a conduct which is unbefitting of you and/or your firm being an advocate and solicitors of our Client.

18. Notwithstanding that, we are further informed by our Client that your unbefitting conduct being an advocate and solicitors can be further seen, by you and/or your firm filing the Notis Rayuan at the High Court of Melaka on 11.10.2016 *against the striking out of the second suit (enclosure 5) instead of filing the Notis Rayuan against the application to reinstate the suit [enclosure 26], which is the proper mode and procedure.* We are informed by our Client that as a result of yours and/or your firm's blatant act of negligence, our Client had lost the suit against the Defendant.

19. We are further informed by our Client that due to yours and/or your firm's grossly professional misconduct, our Client had terminated yours and/or your firm's services. We are also informed by our Client that there is no room for you to succeed in the appeal against the second suit. (Full particulars of which are well within your knowledge). We are informed by our Client that the reason you had filed an appeal is to make it look like that you are carrying out your responsibility towards our Client, however, we are informed that this was not the case as you and/or your firm had failed to protect our Client's interest by failing to file an appeal against the striking out suit.

20. Based on the above, we are further informed by our Client that as a result of yours and/or your firm's professional misconduct, our Client's suit had been struck out and therefore, our Client had suffered actual losses arising and/or deriving from the suit. (Full particulars of which are well within your knowledge).

21. We are also informed by our Client that, till to date you and/or your firm had been negligent in failing to adhere and/or to comply to the proper procedure against the decision of the Honourable Court dated *26.02.2016.*

22. TAKE NOTICE that we are instructed by our Client to demand from you and/or your firm jointly and/or severally, the total sum of RM482,442.92 which we hereby do, wherein the said sum is to be paid either directly to our Client or to us as solicitors for our Client within *fourteen (14) days* from the date of receipt of this letter, failing which we have our Client's instructions to initiate legal action as our Client deems fit against you and/or your firm without any further reference to you in which case you will be liable to pay all legal costs and all expenses incurred by our Client, and further, we are also informed that our Client will not hesitate to take an appropriate measures to lodge reports against you and/or your firm with the relevant authorities in due course.

23. AND TAKE FURTHER NOTICE that any part payment made by you and/or your firm to our Client shall be received strictly on without prejudice basis to our Client's rights to initiate legal action against you to recover the outstanding balance and such rights shall be exercised by our Client without any further reference whatsoever to you.

(Tetuan Shahrul Balvinder & Co.)

[25] The respondent's defence is that they are not negligent because Suit 04 was not dismissed on merits but struck out due to the non-attendance of the respondents. The respondents further say that it was not wrong for them not to file an appeal against the dismissal of the application for reinstatement.

[26] The appellant sued the respondents for negligence at the Sessions Court in Suit 313. The SCJ held that the respondents were negligent and that they had caused loss of opportunity (chance) for the appellant to recover from Sinnayah, the amount outstanding under the sub-contract. The SCJ also held that there was a high probability that the appellant would have succeeded in their claim against Sinnayah.

[27] The relevant part of the SCJ's judgment on negligence reads as:

20. In this case, this Court finds that the Defendants had failed to act reasonably in conducting the Plaintiff's Melaka Sessions Court proceedings. Based on the unrebutted evidence by SP1, this Court finds that the Defendants had breach the duty of care expected of a competent practitioner. Further there is also breach of duty by the Defendants in failing to inform and explain the circumstances and position of the cases at the Melaka Sessions Court proceedings to the Plaintiff and obtaining further instructions from him.

21. It is clear that the breach by the Defendants in failing to attend the Court on the continuation of the trial on 11.1.2016 and the act of filing a new suit against same party for the same reliefs and (*sic*) informing the Plaintiff of the case had directly caused the Plaintiff losses as they are deprived of pursuing their claim against Sinnayah & Sons Sdn Bhd and further losses of paying the costs ordered against them.

[28] As for the appellant's prospects of success in their claim against Sinnayah, the SCJ opined:

26. Based on the testimony of SP2 he had stated that monies undertaken for the project was paid to Sinnayah & Sons Sdn Bhd being the main contractor and that main contractor had in fact defaulted in making the payment to the subcontractor being the Plaintiff in this case.

Though SP2 is not aware of the amount of the contract between Plaintiff and Sinnayah & Sons Sdn Bhd, nevertheless this Court accepts the evidence of SP1 that the Plaintiff in fact had fulfilled his obligations under the contract between him and Sinnayah & Sons Sdn Bhd and is entitled to the claim in the B52C-04-09/2014 suit. **There is a high probability of the Plaintiff obtaining judgment in his favour in B52C-04-09/2014 suit.** Based on the above grounds this court allows the claim for the losses occurred due to the negligence of the Defendants in handling Plaintiff's suit in the Melaka Sessions Court Proceedings. (emphasis added)

The Decision Of The High Court

[29] On appeal to the High Court, the decision of the Sessions Court was reversed. In reversing the decision of the Sessions Court on the question of liability for negligence, the learned judge opined that the appellant had "**wrongfully terminated**" the services of the respondents and that by their own non-attendance in court in respect of Suit 04 on 11 January 2016, **the appellant were themselves negligent.** Finally, the learned judge concluded that since a complaint of misconduct against the respondents under s. 100(1)(a) of the Legal Profession Act 1976 had been dismissed by the Advocates and Solicitors Disciplinary Board ("ASDB") per ASDB order dated 10 August 2018, it follows that there would be no professional indemnity insurance cover for the respondents and that in those circumstances, it would be wrong to hold the respondents liable for negligence. (emphasis added)

[30] The learned judge's basis for his conclusions and justification for reversing the decision of the SCJ may be gleaned from the following parts of his judgment which reads:

In the grounds of judgment of the learned SCJ at page 27 of the appeal record additional (tambahan) wherein the learned SCJ had stated that the court the outcome of the appeal in B52NCVC-18-05-2018 is not an issue but the act of the defendants in conducting the Malacca Sessions Court had caused the plaintiff's claim being struck out once due to non-appearance at the continuation hearing date.

The Court was of the view that the reference to the conduct by the learned SCJ must necessarily also referred to the conduct of the defendant in filing an appeal to the High Court Malacca against the decision of the Registrar allowing the plaintiff's application to strike out the 2nd Summons and statement of claim and hence the appeal was not decided by the High Court Malacca. It was have been different if the appeal by the defendant was heard on the merits and then dismissed. The High Court then would have given its reasons for the dismissal. It was only then the matter could be said to have a final decision on the fate on the appeal arising out of the striking out of the 2nd Summons and statement of claim. Even that if the High Court Malacca were to dismiss the appeal, the defendant could exhaust its remedy by filing an appeal to the Court of Appeal being the apex court of appeal for matters emanating from the subordinate court.

The Court was of the considered view that the plaintiff's act of terminating the services of the defendant as solicitors had compromised and jeopardised the plaintiff own position in the matter. The Court was of the considered view that the plaintiff's own conduct that had cause the matter to be left unattended to in the matter against the company. The Court was of the further view that it was wrong for the plaintiff to have terminated the services of the defendant as solicitors as it was not procedurally wrong for the defendant to have lodged an appeal at the High Court Malacca over the dismissal of the 2nd Summons. This is because Order 92 rule 4 of Rules of Court does provide for the inherent power of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

Both the plaintiff and the defendant could rely on Order 92 rule 4 to advance their respective argument. It would be perhaps being the argument for the defendant that if the 2nd Summons and statement of claim was struck out it would be an injustice to the plaintiff as the case had not being fully heard given the circumstances which lead to the decision by the Sessions Court to struck out the plaintiff claim. Conversely it could be also argued by the company that by filing the 2nd Summons could be an abuse of the process of court. The High Court could give its decision either way. The Court was of the considered view that the act of the plaintiff terminating the services of the defendant was a wrongful act and as such the plaintiff ought not to benefit from its wrongful act by claiming damages against the defendant.

From the facts of the case it transpired that when the case was fixed for re-examination the solicitors for the company prayed for a continued hearing date to prepare Q&A of which the court fixed further hearing dates namely on 7.01.2016, 11.01.2016, 01.02.2016 and 02.2.2016.

Thereafter on 7.1.2016 the trial was vacated because the 3rd plaintiff's (*sic*) mother had passed away and the court fixed 11.1.2016 as the date for the continued hearing. The plaintiff representative was present and was aware that the next continued hearing was on 7.1.2016 and 11.1.2016 respectively. On the 11.1.2016 from the note of proceeding the plaintiff's representative was not present and could ask for the matter to be adjourned to the next date 1.2.2016 and subject always if the court was minded to allow a further postponement and imposed cost to the plaintiff. By not being present on the 11.1.2016 the plaintiff was also negligent in not attending court on the hearing date on 11.1.2016.

The Court also took judicial notice of the fact that the Disciplinary Board of the Bar Council had ruled that the defendant was not negligent following the complaint lodged by the plaintiff's representative. The Court is of the view that by the decision of the Disciplinary Board means the professional indemnity insurance coverage will not be make available to the defendant as advocates & solicitors under the scheme. That being the situation if the defendant is found negligent by the court then damages would have to be borne by the defendant personally which would be unfair to the defendant.

Usually if the Disciplinary Board makes a finding of negligent and a suit is filed, the insurer with provide legal counsel to represent the defendant and negotiation to settle the matter could be done. In the instance case the defendant is left alone to defend this action whilst the D.B had ruled that the defendant was not negligent.

In this respect the Court was of the considered view that considering the circumstances of the case, the learned SCJ had erred in not taking into account the act of the plaintiff terminating the services of the defendant was a wrongful exercise of the plaintiff right to the detriment of the defendant. The decision of the D.B was not available during the trial of the matter before the Sessions Court but it was only after a decision was delivered that the decision of the D.B was delivered. Be that as it may the Court considered that evidence is relevant and is not a disputed fact as the complainant was the plaintiff.

Arguments On Appeal

[31] It was submitted for the appellant that damage to the appellant crystallised when Suit 04 was struck due to the third respondent's non-attendance. Next, the respondents were negligent in failing to appeal against the dismissal of the reinstatement application in Suit 04. Lastly, Suit 18 ought not to have been filed.

[32] The further issue to be decided is whether the appellant had compromised and jeopardised its case by terminating the services of the respondents. It was submitted for the appellant that the respondents were clearly negligent in filing Suit 18 without appealing against the decision of the Melaka Sessions Court in refusing to reinstate Suit 04. A

[33] According to counsel for the appellant, the filing of Suit 18 by the respondents was clearly wrong since Suit 04 had proceeded to trial with witnesses on both sides having given evidence and the appellant having closed their case. Thus, it was premature of the respondents to file Suit 18 without filing an appeal to the High Court and if need be, to the Court of Appeal. B C

[34] Thus, it was submitted for the appellant that an appeal to the High Court should have been lodged by the respondents against the refusal by the Melaka Sessions Court to reinstate Suit 04. The respondents failed to do so and by virtue of their retainer, there was a breach of duty by the respondents since they failed to exercise care and skill in fulfilling their contractual obligations. The retainer further gave rise to liability in tort for negligence arising from the solicitor-client relationship. D

[35] It was argued that the respondents failed to advise the appellant that the application for reinstatement of Suit 04 had been dismissed by the court with costs of RM2,000. The affidavit-in-support for the reinstatement application was affirmed by the third respondent and not by the appellant. The respondents deliberately concealed the striking out of Suit 04 from the appellant and that was the reason no affidavit-in-support of the reinstatement application was affirmed by the appellant. E F

[36] Further, the affidavit-in-support of the reinstatement application never alluded to any merits of the appellant's claim against the Sinnayah and was a bare affidavit.

[37] The respondents similarly failed to notify and advise the appellant that Suit 18 had been filed and subsequently failed to advise that Suit 18 had also been struck out by the court with costs of RM4,000. The respondents never informed the appellant of the developments of Suit 04 and neither sought instructions from the appellant. The respondents acted in such a way as if they were parties to these suits and clearly failed to communicate with the appellant and seek instructions. G H

[38] The filing of the application to reinstate Suit 04, the execution of the affidavit-in-support and the filing of Suit 18 were all done without proper instructions and knowledge of the appellant. The appellant only learnt about the outcome of Suit 04 after applying and obtaining the notes of evidence from the Melaka Sessions Court by letter dated 26 October 2016. In spite I

of overwhelming evidence that the appellant was totally kept in the dark in respect of the suits and which evidence was not challenged, the learned judge proceeded to hold that the appellant had "compromised and jeopardised" their claim by terminating the services of the respondents. According to the appellant, the learned judge erred in failing to consider and appreciate the background and material facts which led to the respondents' termination.

[39] In this regard, it is contended that the evidence of SP1 (representative of the appellant) clearly shows that Suit 04 was struck out because of the negligence of the respondents. It was highlighted that the cross-examination of SP1 was focused only on Suit 18 namely, the respondents should have been allowed to proceed with the appeal against the striking out. According to the appellant, the outcome of the appeal in the Suit 18 is not the core issue in this appeal.

[40] It was contended on behalf of the appellant that the fact that the respondents filed Suit 18 did not and should not make a difference as it was clearly an abuse of process of the court.

[41] In this regard, reference was made to the Federal Court case of *Lim Oh & Ors v. Allen & Gledhill* (*supra*), which decided at p. 481:

> The appellants ought to have appealed against the decision striking out their first suit for disobedience of that peremptory order. The filing of the 2nd suit, containing as it did, the same issues and reliefs as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court.

[42] Counsel for the appellant also referred to the case of *Genesis World Sdn Bhd v. Mobikom Sdn Bhd* [2003] 7 CLJ 100; [2003] 4 MLJ 263; [2003] 6 AMR 67 HC, where the High Court held at pp. 106 to 107 (CLJ); p. 271 (MLJ):

> The defendant maintained that the Plaintiff was estopped from filing this present suit against them as this was a deliberate attempt to circumvent the essential appeal process and therefore amounted to a blatant abuse of court process.
>
> The Plaintiff, on the other hand, argued that as the first suit was struck out for want of prosecution, there was no decision on the merits of the matter. Having commenced the present suit within the limitation period, the Plaintiff was entitled to proceed with the second action.
>
> I find that the Plaintiff's failure to appeal against the striking out of their first suit constituted a concession that the decision of the learned SAR was correct. By not appealing, the plaintiff are now, in fact, precluded from canvassing the argument that they were still within the six-year limitation period. The Plaintiff should not be allowed to reagitate an issue (on limitation) which may only be available to them had they appealed against

> the dismissal of the first suit for want of prosecution. Should this court hold the converse view it would only encourage litigants to ignore the Rules of the High Court and act with impunity so long as the limitation period has yet to run its full course. I am mindful that in practice the courts are averse to dismissing a suit for want of prosecution where the limitation period has not expired. However, where a plaintiff had opted not to appeal but instead file a fresh action, what becomes relevant in the fresh action is whether he has given some cogent reason why second action should be allowed to proceed.

[43] Lastly, reference was made to the case of *Punj Lloyd Oil & Gas (Malaysia) v. Etiqa Insurance Bhd & Ors* [2014] 1 LNS 1152; [2015] 2 MLJ 434 HC, where the High Court held at p. 434:

> It would be a clear abuse of process of court and an injustice to the defendants if the Plaintiff was allowed liberty to file the claim afresh as the cross-examination and re-examination of its first witness had been completed; it would be giving the plaintiff 'a second bite of the cherry'. There was also no guarantee Umang would be present at the trial (see para 18).

[44] Based on the aforesaid case laws, it was submitted for the appellant that the failure by the respondents to appeal against the reinstatement application and the filing of Suit 18 is clear negligence as the respondents have failed to fully exhaust the appeal procedure.

[45] The appellant also referred to a letter dated 26 March 2016, which they wrote to the first respondent, voicing dissatisfaction in regards to the services rendered by the respondents and seeking an explanation. This letter though received was neither replied nor challenged by the respondents, thus confirming the contents of the letter in respect of the breach of duty and negligence by the respondents.

[46] The letter reads as follows:

> HIJAU BIRU ENVIROTECH SDN. BHD. (984810-K)
> Lot 5.113, 5th Floor, Wisma Central, Jalan Ampang, 50450
> Kuala Lumpur, Malaysia
>
> Tarikh: 26 Mac 2016
>
> DZAHARA & ASSOCIATES
>
> LR-401, Menara D, Persiaran MPAJ
> Jalan Pandan Utama, Pandan Capital
> Pandan Indah, 55100 Ampang, Selangor
> Tel: 03-4280 5598
> Fax: 03-4280 4248
> Email: deeassociates@yahoo.com.my

Tuan,

Per: Maklumat Dan Dokumen Bagi Saman
Tuntutan Bayaran Terhadap Sinnayah & Sons Sdn. Bhd.
No. Saman B52C-04-09/2014

Saya merujuk kepada perkara di atas. Sebagai Plaintif, saya berasa amat hampa dan sangat tertekan dengan sikap serta layanan kurang peduli pihak Tuan sebagai Peguamcara saya, terhadap kes tersebut diatas.

Sehingga saya terkejut apabila kebetulan terserempak dengan seorang staf pihak Defendan lewat bulan Januari 2016 dimana saya telah diberitahu bahawa kes tersebut telah diputuskan oleh Mahkamah Sesyen Melaka pada 11 Januari 2016 dan Syarikat kami sebagai Plaintif telah KALAH (Buang Kes).

Semenjak suku akhir tahun 2015 sehingga minggu ini, pihak saya telah banyak kali menghubungi Tuan Azwan dan Puan Dzahara melalui panggilan telefon dan pesanan whatsapp untuk mendapatkan maklumat lanjut mengenai perjalanan kes tersebut termasuk bila perbicaraan akan disambung semula, tetapi gagal. Beberapa permohonan saya untuk kita bertemu dan berbincang juga tidak mendapat layanan dan maklum balas.

Sehingga Mac 2016, pihak Tuan tidak langsung memberitahu mengenai tarikh asal atau tarikh tunda sambung perbicaraan. Saya juga tidak diberikan maklumat sepenuhnya mengenai status kes tersebut.

Oleh itu saya sendiri telah pergi ke Mahkamah Melaka pada pagi Jumaat 26 Mac 2016, bersama rakan Mejar (B) Hj. M. Isa dan Hajah Haizan, untuk mengetahui kedudukan sebenar kes tersebut. Maklumat yang saya perolehi dari pejabat Mahkamah Sesyen 2 Melaka adalah seperti berikut:

6 Januari 2016 – tarikh asal sambung perbicaraan tetapi pihak Tuan mohon penangguhan;

7 Januari 2016 – tarikh perbicaraan tertangguh tetapi pihak Tuan mohon penangguhan;

11 Januari 2016 – tarikh perbicaraan tertangguh ke-3 tetapi pihak Tuan gagal hadir atau memberitahu Mahkamah (melalui telefon/faks/email) mengenai sebab ketidakhadiran. Setelah menunggu sehingga jam 12.45 tengah hari, Hakim membuat keputusan untuk buang kes;

Sehingga tamat tempoh merayu selama 14 hari bekerja, tiada sebarang rayuan kes difailkan oleh pihak Tuan; dan

Fail kes ini di Mahkamah Sesyen telah ditutup dan tiada sebarang rayuan akan dibenarkan kecuali di Mahkamah Tinggi, itupun jika mendapat kebenaran.

Maklumat yang saya perolehi di atas amat-amat memeranjatkan dan sangat lah menggusarkan fikiran saya. Saya faham bahawa bonda Tuan telah meninggal dunia pada 6 Januari 2016. *Namun pihak pejabat Tuan, sebagai Peguam pihak Plaintif, dilihat tidak ambil inisiatif untuk susuli tarikh*

tunda perbicaraan dengan Mahkamah mahupun segera memaklumkan Mahkamah mengenai kesukaran Tuan sehingga Mahkamah mungkin rasa terhina. Saya juga amat kesal kerana Tuan sebagai Peguam saya, gagal memaklumkan kedudukan sebenar kes ini kepada saya dengan tepat dan segera. Sehingga saya sendiri perlu ke Mahkamah untuk ambil tahu mengenai status kes tersebut.

Sehubungan itu, *saya memohon Tuan menjelaskan* perkara-perkara berikut:

Apakah yang dimaksudkan oleh Puan Dzahara dalam pesanan whatsapp bertarikh 22 Mac 2016 "Reinstatement was dismissed on 26 Februari 2016"? Adakah ia rayuan kes tersebut dan ia ditolak kerana telah difailkan terlalu lambat?

Apakah yang dimaksudkan oleh Puan Dzahara dalam pesanan whatsapp bertarikh 22 Mac 2016 "kes akan di Mention pada 20 April 2016"? Apakah tajuk kes dan di Mahkamah yang mana ia difailkan? Adakah kes rayuan di Mahkamah Tinggi?

Dengan kadar segera, saya meminta pihak Tuan memberi kepada saya SEMUA dokumen/salinan dokumen berkaitan perjalanan kes tersebut di atas sehingga hari ini termasuk dan tidak terhad kepada:

i. Keputusan/Perintah Mahkamah bagi perbicaraan berakhir 11 Januari 2016;

ii. Dokumen-dokumen berkaitan permohonan "reinstatement" pada Februari 2016 beserta Keputusan Mahkamah mengenainya;

iii. Dokumen-dokumen berkaitan kes yang akan disebut pada 20 April 2016.

Saya juga berharap Tuan dapat meluangkan masa untuk memberi taklimat kepada saya secara bersemuka dan supaya kita sama-sama berbincang mengenai perjalanan kes ini seterusnya. Saya bersedia untuk hadir ke-pejabat Tuan pada minggu ini, sila tetapkan tarikhnya.

Sekian, terima kasih

Yang benar,
HIJAU BIRU ENVIROTECH SDN. BHD.

Hussian Bahar Bt. Ahmad Khan
Pengarah Urusan

(emphasis added)

[47] The third respondent admitted during cross-examination that the respondents **did not reply to the appellant's letter dated 26 March 2016.** Being dissatisfied that no reply was forthcoming from the respondents, the appellant subsequently terminated the respondents' services by letter dated 9 January 2017. (emphasis added)

[48] SP1's evidence on negligence and breach of duty was neither challenged nor rebutted by the respondents. SP1 was never cross-examined or challenged by the respondents on the material issue that the respondents were negligent in:

(i) failing to advise that Suit 04 had been struck out;

(ii) failing to advise that an application for reinstatement had been filed;

(iii) failing to advise that the reinstatement application was dismissed with costs of RM2,000;

(iv) failing to advise that Suit 18 had been filed; and

(v) failing to advise that Suit 18 had been struck out with costs of RM4,000.

[49] In so far as the respondents' failure to cross-examine SP1's evidence is concerned, counsel relied on the case of *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 CA, where the Court of Appeal held at p. 551:

> The main thrust of the Defendants' case was that the Plaintiff had requested the first respondent's permission to climb the tree which the first respondent refused. The Plaintiff's case, on the other hand, was that he had been instructed by the first defendant to make the climb. But nowhere in the defence was it alleged that there was such a request as alleged in the evidence. *Further and more importantly, it was never put to the Plaintiff under cross-examination that such a request had come from him. The trial judge ought to have taken this failure into account when he came to assess the evidence.* But nowhere in his judgment is there any indication that he did so. In *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal* [1995] 2 MLJ 770 at p 794, this court when applying the rule in *Browne v. Dunn* (1893) 6 R 67 said:
>
> > It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well. (emphasis added)

[50] Thus, it was submitted that the respondents owed the appellant a duty of care since there existed a solicitor-client relationship which is not in dispute. The standard to be exercised by the respondents was the standard of the ordinary skilled man exercising and professing to have that special skill. It was contended that the respondents had not only failed to perform their obligations with due diligence and the required skill and care, they were also liable in tort for their wrongful act of depriving the appellant of the opportunity of prosecuting a valid claim in order to recover the debt from Sinnayah.

[51] Counsel for the appellant referred to the case of *Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344 CA, where the Court of Appeal had stated at p. 345:

> **Advocates and solicitors undertake an onerous task when they agree to act for a client.** There is an assumption of responsibility by the advocate and solicitor coupled with reliance by the client on the skill of the advocate and solicitor. The advocate and solicitor's duty to exercise reasonable care and skill is imposed both by contract and by the law of tort.
>
> **One of the fundamental duties of an advocate and solicitor is to diarise his cases, keep his client informed of the diarised dates and prepare the case with the client.** This was a case where there was a failure to discharge that rather fundamental obligation, as a result of which the respondents suffered. Therefore, the causative link between the negligent omission and the damage was established. (emphasis added)

[52] Reference was also made to the case of *Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal* [2009] 3 CLJ 751; [2009] 1 MLRA 381 CA, where the Court of Appeal opined at pp. 761 to 762:

> [27] To succeed in the tort of negligence against the solicitor, it is incumbent on the client to establish that:
>
> (1) the solicitor owes the client a duty of care;
>
> (2) there is a breach of that duty by the solicitor;
>
> (3) the client has thereby suffered damage; and
>
> (4) the damage is not too remote a consequence of the breach.
>
> [28] For the purpose of establishing a breach of contractual duty against the solicitor, the client must prove:
>
> (1) the existence of a contractual relationship which expressly or impliedly impose a contractual duty on the solicitor;
>
> (2) there is a breach thereof by the solicitor;
>
> (3) the client has thereby suffered damage; and
>
> (4) the damage is not too remote a consequence of the breach.

[53] It was submitted on behalf of the appellant that based on the evidence of SP1 and SD1 (the third respondent), negligence and/or breach of duty had been proven against the respondents.

[54] During the appeal before the High Court, the respondents produced an order from the Advocates and Solicitors Disciplinary Board ("the ASDB Order") dated 10 August 2018. The ASDB Order was in respect of the dismissal of a complaint that was lodged by the appellant against the respondents. The ASDB Order was made under s. 100(1)(a) of the Legal Profession Act 1976 which reads:

A Where a written application or complaint is made or referred to the Disciplinary Board, the Disciplinary Board shall, if it is satisfied that:

(a) there is no merit in the application or complaint, dismiss the application or complaint and notify the complainant and the advocate and solicitor of its decision; ...

B **[55]** The respondents placed the ASDB Order as Tab G in their bundle of authorities when the matter came up on appeal before the High Court. The appellant's solicitors objected as this was "fresh" evidence and leave to adduce the same had not been obtained. The learned judge nevertheless relied on the ASDB Order and said:

C The court also took judicial notice of the fact that the Disciplinary Board of the Bar Council had ruled that the defendant was not negligent following the complaint lodged by the plaintiff's representative. The Court is of the view that by the decision of the Disciplinary Board means the professional indemnity insurance coverage will not be make available to
D the defendant as advocates & solicitors under the scheme. That being the situation if the defendant is found negligent by the court than damages would have to be borne by the defendant personally which would be unfair to the defendant. Usually if the Disciplinary Board makes a finding of negligent and a suit is filed, the insurer will provide legal counsel to represent the defendant and negotiation to settle the matter could be
E done. In the instance case the defendant is left alone to defend this action whilst the DB had ruled that the defendant was not negligent.

[56] Before us, the appellant argued that the learned judge erred in relying, accepting and making reference to the ASDB Order for the following reasons:

F (i) no leave was obtained by the respondents under O. 55 r. 7 of the Rules of Court 2012;

(ii) the ASDB Order was issued after the completion of the trial at the Sessions Court; and

(iii) the ASDB Order was never referred to or admitted in evidence at the
G Sessions Court.

[57] On the learned judge's conclusion that the appellant was negligent in not turning up in the Sessions Court on 11 January 2016, it was argued for the appellant that the decision by the learned judge on this issue is obviously unsustainable because:

H (i) the respondents did not plead negligence against the appellant;

(ii) it was never the case of the respondents that the appellant was negligent;

(iii) the appellant had given evidence and closed its case and as such there
I was no requirement for the appellant to be present in court on 11 January 2016; and

(iv) it was for Sinnayah to present their defence and it was necessary for the respondents to attend court on 11 January 2016 as they were the solicitors who were acting for the appellant.

Decision Of This Court

[58] The critical issue before us is whether in the circumstances, the SCJ was "plainly wrong" and appellate interference by the High Court was warranted and whether the learned judge had in turn erred or misdirected himself in interfering with the decision of the SCJ who had found that the respondents were liable for negligence.

[59] It is apparent that the learned judge had concluded that the appellant were somewhat the authors of their own misfortune or had brought this (loss of chance to sue Sinnayah) upon themselves because of their "wrongful termination" of the services of the first respondent on or around 9 January 2017.

[60] Clearly and understandably, by that time, the appellant were most unhappy with the state of things and were entitled to terminate the services of the first respondent as their solicitors. That was always the appellant's right as the client of the first respondent law firm.

[61] The pertinent question is whether the so-called "wrongful termination" of the first respondent was the causative event which deprived the appellant of the loss of chance to sue Sinnayah. In our view, nothing turns on the termination of the first respondent or the non-prosecution of the appeal to the High Court in respect to the striking out of the Suit 18.

[62] In fact, the termination of the first respondent as the appellant's solicitor and the non-prosecution of the appeal (*vis-a-vis* striking out of Suit 18) did not in any way alter or mitigate the situation or problem which was already caused by the first respondent's handling (or rather mis-handling) of Suit 04 which we had said, lies at the epicentre of the appellant's complaint of negligence against the respondents.

[63] In so far as the appellant was concerned, apart from not truthfully apprising them of the actual status of Suit 04 and the various court related events, and failing to attend court on 11 January 2016, the next most significant aspect of the respondents' negligence was is their failure to file an appeal to the High Court against the decision of the Melaka Sessions Court on 26 February 2016 in dismissing the application to reinstate Suit 04. In para. 8(xviii) of the statement of claim dated 18 July 2017, the appellant had pleaded negligence against the respondents in the following manner:

Plaintif seterusnya menyatakan bahawa kecuaian Defendan-Defendan tersebut di dalam tindakan ini dapat diperlihatkan apabila Defendan-Defendan tersebut telah gagal untuk memfailkan satu rayuan terhadap keputusan Mahkamah yang mulia tersebut yang diberikan pada 26.02.2016 dan sebaliknya, telah secara cuai dan salah tanpa mengikut prosedur yang betul Kaedah-Kaedah Mahkamah 2012, memfailkan satu Guaman baru dengan memfailkan Writ Saman dan Pernyataan Tuntutan yang bertarikh 17.5.2016 masing-masing di Mahkamah Sesyen Melaka melalui Guaman Kedua No. B52NCVC-18-05/2016 ("Guaman Kedua tersebut") yang melibatkan pihak-pihak dan tuntutan yang sama seperti di dalam Guaman tersebut.

[64] The respondents' defence in response to the issue of negligence:

6. Defendan-Defendan seterusnya menyatakan bahawa pada 6/1/2016, ibu Defendan Ketiga yang juga ibu mertua Defendan Kedua telah meninggal dunia dan dikebumikan pada 7/1/2016.

7. Defendan Kedua telah menelefon peguamcara dan Mahkamah Sesyen Melaka untuk memaklumkan berita kematian ibu Defendan Ketiga dan memohon agar tarikh-tarikh perbicaraan ditangguhkan.

8. Defendan-Defendan telah dimaklumkan oleh peguamcara dan Mahkamah bahawa perbicaraan telah ditangguhkan oleh Mahkamah.

9. Merujuk kepada perenggan B xii Pernyataan Tuntutan Plaintif, Defendan-Defendan sesungguhnya menyatakan bahawa ketidakhadiran Defendan-Defendan pada 11/1/2016 BUKANLAH satu kecuaian tetapi adalah kerana tidak dimaklumkan oleh peguamcara bahawa hanya tarikh 7/1/2016 sahaja yang ditangguhkan dan tarikh-tarikh lain diteruskan.

10. Atas kepercayaan bahawa tarikh-tarikh bicara telah ditangguhkan maka Defendan-Defendan tidak menulis di dalam diari harian tarikh perbicaraan 11/1/2016 untuk kehadiran peguamcara ke Mahkamah.

11. Defendan-Defendan seterusnya menyatakan bahawa Defendan-Defendan hanya mengetahui bahawa Perbicaraan diteruskan pada 11/1/2016 setelah Defendan-Defendan menelefon peguamcara lebih kurang pada 14/1/2016 dan hanya pada ketika itu peguamcara pihak lawan memaklumkan bahawa kos telah dibatalkan kerana ketidakhadiran peguam dan pihak Plaintif.

12. Defendan-Defendan seterusnya menyatakan bahawa setelah mengetahui bahawa kes tersebut telah dibatalkan atas sebab tidak kehadiran peguam dan Plaintif dan BUKANNYA diputuskan oleh Mahkamah secara Penghakiman menolak Tuntutan Plaintif dengan kos maka Defendan-Defendan telah membuat keputusan atas mandat penuh yang telah diberikan oleh Plaintif sewaktu perlantikan, telah memilih untuk memfailkan semua Tuntutan

Plaintif dan tindakan ini tidak menyalahi mana-mana peruntukan undang-undang atau prosedur Mahkamah kerana Mahkamah hanya membatalkan Tuntutan Plaintif atas dasar teknikal dan BUKANNYA MERIT KES.

13. Oleh itu, Defendan-Defendan menafikan sekeras-kerasnya wujud kecuaian di pihak Defendan-Defendan kerana tindakan yang diambil oleh Defendan-Defendan untuk meneruskan tindakan Plaintif di Mahkamah adalah tindakan yang dibenarkan oleh peruntukan undang-undang.

14. Defendan-Defendan seterusnya menyatakan bahawa setelah tindakan saman baru (Guaman Kedua) dibatalkan oleh Pendaftar menerusi permohonan oleh peguamcara lawan, Defendan-Defendan telah memfailkan Notis Rayuan bagi merayu Keputusan Pendaftar tersebut bagi membolehkan Guaman Kedua diteruskan.

15. Defendan-Defendan seterusnya menyatakan bahawa sebelum sempat Defendan-Defendan menyempurnakan tugasan di peringkat Rayuan, Plaintif telah bertindak sendiri dan melantik peguam baru untuk Rayuan tersebut.

16. Defendan-Defendan sesungguhnya menafikan keseluruhan kenyataan Plaintif yang mendakwa Defendan-Defendan tidak cuai kerana segala tindakan dan prosedur yang diambil oleh Defendan-Defendan adalah mengikut peruntukan undang-undang yang ada dan tidak diluar aturan.

17. Defendan-Defendan sesungguhnya menyatakan bahawa Defendan-Defendan percaya bahawa Rayuan yang difailkan untuk merayu keputusan Pendaftar yang membatalkan Guaman Kedua akan berjaya sekiranya diteruskan oleh Defendan-Defendan.

[65] Clearly, it can be seen from the defence that the respondents were negligent in a number of respects in terms of their handling of Suit 04. First, there is no dispute that the next set of trial dates (7 January, 11 January, 1 February and 2 February 2016) were all fixed on 29 September 2015. The third respondent was present in court on that day. Thus, these dates ought to have been entered in the respective diaries of the respondents.

[66] Next, the manner in which the adjournment of the part-heard trial was sought was inherently risky. It is alleged that the request was made *via* telephone call. Whilst certain situations may necessitate an initial contact *via* telephone, it is absolutely imperative and necessary as part of proper risk management, that the telephone call(s) be subsequently confirmed in writing so as to obviate any misunderstanding or miscommunication. More so, in the particular facts of this case where the respondents had contended that they had in the telephone call to Sinnayah's solicitor and to the Sessions Court requested for the dates (tarikh-tarikh) to be vacated.

[67] But that was not in fact the case. In fact, the Sessions Court only vacated the hearing, which was fixed for 7 January 2016. The other dates were maintained. The respondents did not see it fit or necessary to confirm in writing their so-called understanding that all the trial dates were to be vacated. Had the non-attendance on 11 January 2016 been due all along to a misunderstanding, it would have been reasonable to see that proffered as the reason for the reinstatement. Instead, the respondents only claimed that the third respondent was on leave at the material time.

[68] At the trial of the negligence suit, the respondents offered yet another excuse. In this regard, it is necessary to reproduce the following evidence touching upon the issue of the request for adjournment. In his witness statement, the third respondent stated that:

> 11. S: Adakah Perbicaraan berjalan pada tarikh-tarikh 7.1.2016, 11.1.2016, 1.2.2016 dan 2.2.2016?
>
> J: Tidak. Pada 6.1.2016 ibu saya telah meninggal dunia *dan pejabat saya telah memaklumkan kepada Mahkamah dan peguam Defendan Guaman Asal untuk menangguhkan tarikh-tarikh Perbicaraan.* Peguam Defendan Guaman Asal pada 7.1.2016 telah memaklumkan Mahkamah berhubung permintaan saya dan memberikan kebenaran. Peguam Defendan Guaman Asal telah memaklumkan Defendan Pertama bahawa tarikh Perbicaraan telah ditangguhkan dan tarikh baru akan dimaklumkan kelak. Defendan pertama telah mengeluarkan tarikh-tarikh Bicara pada 11.1.2016, 1.2.2016 dan 2.2.2016 sebagai tarikh Bicara.
>
> 12. S: Adakah Plaintif hadir ke Mahkamah Sesyen Melaka pada 7.1.2016?
>
> J: Saya tidak tahu dan tidak dimaklumkan oleh Plaintif sama ada Plaintif atau wakilnya hadir ke Mahkamah pada 7.1.2016 tetapi saya yakin Defendan Pertama telah memaklumkan kepada Plaintif bahawa saya tidak dapat hadir pada 7.1.2016 kerana ibu saya meninggal dan peguam Defendan Guaman Asal telah bersetuju untuk memohon penangguhan tarikh Perbicaraan dan tarikh baru akan dimaklumkan.
>
> S: Seterusnya apa yang berlaku?
>
> J: Setelah dimaklumkan oleh peguam Defendan Guaman Asal pada 7.1.2016 bahawa Perbicaraan telah ditangguhkan, saya tidak menghadiri ke Mahkamah di Melaka pada 11.1.2016 dan terus menguruskan pengebumian dan hal-hal kematian ibu saya di kampong. Setelah saya kembali di Kuala Lumpur dan bertanyakan kepada

kerani Defendan Pertama tarikh baru Perbicaraan dan setelah kerani Defendan Pertama menghubungi Pejabat Peguam Defendan Guaman Asal, Peguam Defendan Guaman Asal memaklumkan bahawa kes tersebut telah dibatalkan oleh Mahkamah kerana ketidakhadiran Peguam dan Plaintif ke Mahkamah pada 11.1.2016.

[69] During cross-examination, the third respondent's response to the non-attendance in court on 11 January 2016 was as follows:

PC: Mengapakah guaman tersebut, dibatalkan pada 11 January 2015, ... 2016?

SD1: Puan seperti yang saya jawab tadi, ketidakhadiran peguam dan anakguam Puan. Iaitu peguam Plaintif dan juga Plaintif, tidak hadir.

PC: Apakah alasan ketidakhadiran peguam Plaintif pada tarikh tersebut.

SD1: Ianya tidak tercatit di dalam diari pihak peguam untuk hadir pada tarikh tersebut Puan.

[70] In the affidavit-in-support of the reinstatement application, the third respondent stated the following:

4. Berikutan daripada kematian ibu saya itu, saya telah mengambil cuti sehingga 22.1.2016 bagi menguruskan segala berhubung majlis tahlil dan harta pusaka.

5. Saya juga sesungguhnya menyatakan bahawa adalah di dalam rekod dan diary saya dan pejabat saya bahawa pada 11.1.2016 tiada sebarang perbicaraan telah dicatitkan bagi kes ini.

6. Oleh itu saya tidak mempunyai sebarang pengetahuan berhubung perbicaraan kes ini pada 11.1.2016.

7. Saya hanya mengetahui bahawa kes ini telah dibatalkan kerana kegagalan saya hadir di mahkamah pada 11.1.2016 setelah dimaklumkan oleh kerani saya.

8. Saya sesungguhnya menyatakan bahawa kegagalan saya hadir ke mahkamah pada 11.1.2016 bukanlah disengajakan tetapi atas sebab-sebab yang tidak disengajakan dan tidak dapat dielakkan.

9. Saya juga sesungguhnya menyatakan bahawa kegagalan saya untuk menghadiri mahkamah bukanlah kegagalan Plaintif tetapi kegagalan saya secara yang tiada kaitan dengan Plaintif.

[71] However, in response, the solicitor for Sinnayah, Datuk Kesavan P Krishnan affirmed an affidavit to state:

3. Saya telah merujuk permohonan Plaintif untuk menghidupkan semula Writ Saman dan Pernyataan Tuntutan dalam kes di sini kepada Defendan dan saya telah diarahkan untuk membantah kepada permohonan Plaintif ini.

4. Merujuk kepada perenggan 3, Afidavit Sokongan, *saya menyatakan bahawa peguam Plaintif telah memohon kepada Mahkamah Yang Mulia ini untuk menangguhkan tarikh sambung bicara pada 7 Januari 2016 kerana ibu beliau telah meninggal dunia dan Mahkamah Yang Mulia ini telah membenarkan permohonan ini.*

5. Merujuk kepada perenggan-perenggan 5 dan 6, Afidavit Sokongan, saya menyatakan bahawa pernyataan-pernyataan di situ adalah tidak benar.

   Mahkamah telah menetapkan tarikh-tarikh sambung bicara bagi empat (4) hari iaitu 7 Januari 2016, 11 Januari 2016, 1 Februari 2016 dan 2 Februari 2016 di Mahkamah sekaligus dalam kehadiran kedua-dua peguamcara Plaintif dan Defendan. Oleh kerana peguam Plaintif tahu tentang tarikh 7 Januari 2016, peguam Plaintif mesti tahu juga tentang tiga tarikh yang lain.

6. Saya sesungguhnya percaya bahawa Plaintif telah membuat kesilapan dalam tidak mencatit tarikh-tarikh sambung bicara dalam diari beliau dan ini adalah kesilapan peguam.

(emphasis added)

[72] The third respondent did not file an affidavit in response to the abovementioned affidavit. What we can gather from the several averments is that the third respondent was on "leave" until 22 January 2016 and as far as he was concerned, there was no hearing on 11 January 2016. The third respondent's affidavit does not state clearly and unequivocally that a request was made to Sinnayah's solicitors and to the court for the dates in January 2016 to be vacated as the third respondent was on leave until 22 January 2016. On the other hand, Sinnayah's solicitors stated that the request was only for 7 January 2016 to be vacated.

[73] Looking at all the circumstances, it is apparent that the request for adjournment (of the trial dates in January 2016) was mis-handled. Indeed, if the request for an adjournment of the trial dates on 7 and 11 January 2016 had been put in writing and the conversation with the opposite side's counsel confirmed in writing, the respondents may well have stood on firmer ground when applying to reinstate the part-heard case *via* Suit 04.

[74] Nevertheless, after the reinstatement application was dismissed on 26 February 2016, the respondents chose not to appeal to the High Court. Instead, they filed Suit 18 against Sinnayah. Suit 18 was then struck out as being an abuse of process.

[75] The respondents could and ought to have appealed to the High Court against the Sessions Court's refusal to reinstate Suit 04 and if that failed, then to appeal to the Court of Appeal.

[76] Indeed, given that the value of the subject matter of appellant's claim against Sinnayah was not less than RM250,000, the respondents could have even mounted an appeal to the Court of Appeal, as of right, without the need for leave of the Court of Appeal. (see: s. 68(1) Courts of Judicature Act 1964).

[77] However, the respondents chose not to take the route of appealing to the High Court and if necessary, to the Court of Appeal. In doing so, the respondents had effectively deprived the appellant of two rounds of appeal and thereby squandered the opportunity to resurrect the appellant's chance of continuing with their claim against Sinnayah.

[78] Turning next to the standard of care, no doubt, in the Sessions Court the appellant did not call any advocate and solicitor to testify as to what a reasonably competent advocate and solicitor would have done in a similar situation.

[79] In this regard, we note that in *Shearn Delamore & Co. v. Sadacharamani Govindasamy* [2017] 2 CLJ 665; [2017] 1 MLJ 486; [2016] 6 AMR 797 CA, the Court of Appeal had posited that a client who sues their former solicitors for professional negligence have the burden proving that the solicitor's conduct had fallen short of the standard of care of a reasonably competent solicitor and that this is to be done by calling an advocate and solicitor to satisfy the element of breach of the standard of care. (See also *Ngan Siong Hing v. RHB Bank Bhd* [2014] 3 CLJ 984; [2014] 2 MLJ 449; [2014] 1 AMCR 829; [2014] AMEJ 0062 CA).

[80] In *Shearn Delamore*'s case (*supra*), the former client had contended that the solicitors were negligent in respect of legal opinions which they had given on the subject of intellectual property rights. The former client did not call any advocate and solicitor who specialised in intellectual property law to testify in court. The appeal was allowed and the claim was dismissed.

[81] However, in *Nyo Nyo Aye v. Kevin Sathiaseelan Ramakrishnan & Anor And Another Appeal* [2020] 5 CLJ 82; [2020] 4 MLJ 380; [2020] 3 AMR 317 CA, Suraya Othman JCA speaking for the Court of Appeal distinguished *Shearn Delamore*'s case and stated that the failure to call an expert to testify as to the standard of care that is expected of an advocate and solicitor is not fatal in every case of professional negligence against an advocate and solicitor.

[82] The issue in that case was a simple case, which pertained to the duty of a practitioner to inform and advise the client of the consequence of non-payment of security for costs (which was ordered by the court) which would result in the case being struck out. (See para. [64] of the judgment).

[83] Thus, applying the principles that may be culled from the cases mentioned above, and looking at all the circumstances, we are satisfied that in the present case, the failure on the part of the appellant to call an advocate and solicitor to testify on how a reasonably incompetent advocate and solicitor would have handled the situation, is not fatal on the issue of breach of standard of care of a reasonably competent advocate and solicitor.

[84] In our view, apart from the initial negligence of not attending court on 11 January 2016, the respondents had compounded or aggravated their initial negligence by taking the route of not filing an appeal against the dismissal of the reinstatement application and proceeding instead to file Suit 18. Of course, there is no certainty that an appeal to the High Court or the Court of Appeal would have resulted in a reinstatement of Suit 04. We should add that the situation was not helped by the lack of forthrightness on the part of the respondents as to the precise reason for their non-attendance on 11 January 2016 and the third respondent's woefully inadequate and unclear affidavit-in-support of the application to reinstate Suit 04. Yet further, the third respondent did not reply to the affidavit by Sinnayah's solicitor which stated that the request was only for 7 January 2016 to be vacated. This last omission in our estimation, spoke volumes against the respondents.

[85] Ultimately, by their various actions and inaction or inadequacies, the respondents had decimated the appellant's chance of recovery against Sinnayah. In the event, there was a clear and unmistakable finding of professional negligence by the SCJ in Suit 313 and those findings are in our view, clear, cogent and convincing.

[86] We may also add that the respondents' failure to respond to the appellant's letter dated 26 March 2016 and the letter of demand dated 27 April 2017 weighs heavily against the respondents.

[87] In our view, there was no appealable error or any misdirection by the SCJ in her conclusions as to the respondents' liability for negligence. On appeal, the learned judge took the view that the appellant was negligent as they had failed to turn up in the Sessions Court on 11 January 2016.

[88] It may be recalled that the appellant had closed their case on 29 September 2015 and the next set of dates were for re-examination of Ashok who was Sinnayah's second witness and for the other witnesses to testify.

[89] Thus, in those circumstances, the appellant's presence in court was of no moment. Indeed, it is relevant to note that in his Whatsapp message dated 30 December 2015 to the appellant's managing director, the third respondent had (in response to her query) informed that her presence was not necessary. The message reads as:

26 DECEMBER 2015

HB : AsSalam ...

On 7th Jan nanti ... **am i required to attend the trial at court? My absence will jeopardise the case tak**?

30 DECEMBER 2015

LD : wassalampn.
sorry lmbt bls.
tak jeopardise pn. (emphasis added)

[90] In fact, the person who should have been in court on 11 January 2016, was the third respondent. In any event, the respondents had not even pleaded in the defence that the appellant was negligent.

[91] Thus, it was not open to the learned judge to opine that the appellant was negligent. He should have confined himself to the pleaded case. (See *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415; [2017] 8 AMR 517 FC; and *Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd* [2016] 10 CLJ 112; [2014] 2 MLJ 322; [2014] 1 AMCR 102 CA).

[92] Lastly, it is our view that the learned judge had misdirected himself in admitting the ASDB Order and in relying upon the same in exonerating the respondents of negligence. First, the ASDB order was improperly tendered or referred to, *albeit* as part of the bundle of authorities. Critically, it is our view that the ASDB Order was totally irrelevant as the SCJ and/or the learned judge were not bound by the findings of the ASDB. Consequently, we are of the view that the learned judge was plainly wrong in his approach and assessment of the issues on appeal before him.

Outcome

[93] For the reasons as stated above, the appeal is allowed and the decision of the High Court dated 4 July 2019 is set aside. Consequently, the decision of the Sessions Court dated 26 March 2018 is reinstated. The first and second respondents are to jointly and severally pay costs of RM15,000 (subject to allocator) as costs here and in the High Court.

Order accordingly.